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Office of Administrative Law Judges
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Issue Date: 08 October 2004

Case No: 2000-BLA-376

In the Matter of

RICHARD HIXON, Deceased Miner
JO ANNE HIXON, Widow
and
JO ANNE HIXON, Individually

Claimants

v.

ZIEGLER COAL COMPANY

Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Sandra M. Fogel, Esq.
Culley & Wismore
Carbondale, Illinois
For the Claimant

Laura Metcoff Klaus, Esq.
Greenberg Traurig
Washington, D.C.
For the Employer

BEFORE: Rudolf L. Jansen
Administrative Law Judge

DECISION AND ORDER ON REMAND — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title.

Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201 (1996).

The miner filed an application for benefits on January 26, 1988, which claim was finally denied on April 26, 1988. Mr. Hixon filed a second claim on October 20, 1994 and this claim was heard before the undersigned on November 20, 1996. On March 21, 1997, I issued a Decision and Order Denying benefits after finding the existence of pneumoconiosis, but no total disability due to that disease. (DX 27) Mr. Hixon then filed a petition for modification with one additional item of medical evidence in support. While this modification request was pending, Mr. Hixon died, on September 20, 1997. (DX 31; DX 38) After the miner's attorney submitted an autopsy report, the District Director held an informal conference and thereafter determined that pneumoconiosis had been established, but found that Mr. Hixon had not proven total disability due to that disease. Thus, the miner's claim was denied.

The claimant, Jo Anne Hixon, filed a claim for survivor's benefits on August 14, 1998. After an informal conference was held, the District Director issued a Memorandum of Informal Conference recommending that her claim be denied because she did not show that Mr. Hixon's pneumoconiosis contributed to his death, as defined under the regulations. (DX 62).

Both claims were referred to the Office of Administrative Law Judges for a decision. (DX 65-66) The parties agreed to a decision based on the existing record and I issued a Decision and Order Denying Benefits on September 3, 2002. Because the miner's claim was for modification of my previous decision, I examined all of the evidence of record, affirming that Mr. Hixon had shown the existence of pneumoconiosis, but finding that he still had not shown total disability due to that disease. Mrs. Hixon's survivor's claim was denied because she had not established that the miner's death was due to pneumoconiosis as

that standard has been defined under the regulations and by the Seventh Circuit.¹

On appeal, the Benefits Review Board affirmed my finding that the miner had worked for eleven years in qualifying coal mine employment. However, the Board found that I had not complied with the Administrative Procedure Act when I failed to make a finding as to the probative weight each individual medical opinion was assigned in arriving at my final conclusions. The Board also decided that I had not properly resolved the conflicts among the opinions or set forth the rationale underlying my findings supporting the denial of benefits. In particular, I did not properly weigh the medical opinions in concluding that total disability had not been established pursuant to §§ 718.204(b)(2)(iii) and (iv). The Board next found that I had misapplied the Seventh Circuit's holding in *Peabody Coal Co. v. Vigna*, 225 F.23d 465, 22 BLR 2-311 (7th Cir. 2001), by failing to consider whether the miner was totally disabled by his health conditions other than pneumoconiosis before he possibly became disabled due to pneumoconiosis.

Turing to the survivor's claim, the Board determined that I had not properly weighed the conflicting medical opinions surrounding the issue of whether the miner's death was due to pneumoconiosis. Specifically, the Board found that I had not sufficiently examined the bases for each of the medical opinions nor explained the reasons for crediting or discrediting their opinions before concluding that Claimant had not shown death due to pneumoconiosis under § 718.205(c). Thus, the Board issued a remand and directed that I reconsider the medical opinion evidence surrounding the issues of whether the miner was totally disabled due to pneumoconiosis; whether the miner, if disabled, was rendered disabled by conditions other than pneumoconiosis prior to his disability due to his disease; and whether the miner's death was due to pneumoconiosis. In reconsidering the medical opinion, the Board also instructed that I make clear findings "as to the probative weight to which the medical opinions are entitled, resolve conflicts between the opinions, and set forth the rationale" underlying my findings.

1. Because the miner last engaged in coal mine employment in the State of Illinois, this matter arises within the jurisdiction of the Seventh Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

The Findings of Fact and Conclusions of Law that are contained in my prior Decision and Order are adopted in this decision except to the extent that they were found to be erroneous by the Board or to the extent that they are inconsistent with the findings and conclusions expressed herein. Claimant and the Employer have filed briefs on remand, which have been received into the record and fully considered.

ISSUES

The issues remaining for resolution on remand are:

1) Whether the miner was totally disabled from pneumoconiosis as defined under §§ 718.204(b)(2)(iii) and (iv);

2) Whether the miner was disabled by conditions other than pneumoconiosis prior to the time he possibly became disabled due to pneumoconiosis; and,

3) Whether the surviving spouse has shown that the miner's death was due to pneumoconiosis.

Narrative Medical Evidence

In my previous Decisions and Orders, in 1996 and in 2002, I thoroughly discussed and weighed all reports and opinions of record, specifically those reports and notes by Drs. Patel, Spandal, Pangan, Miles, Jones, Naeye, Kleinerman, Caffrey, Tuteur, Repsher, Renn, Green and Cohen, along with medical treatment notes from the VA Center in Danville, Illinois and from the Vermillion Convalescent Center. The Board did not disturb my evaluation of these opinions and, thus, I incorporate my analyses of these medical reports herein.

DISCUSSION AND APPLICABLE LAW

As explained, above, the miner has shown that he is totally disabled from performing his usual coal mine work or comparable work, from a respiratory standpoint, but must also prove that this disability is due, at least in part, to pneumoconiosis. 20 C.F.R. § 718.204(b)(2).

The parties should be reminded that it is Claimant's burden pursuant to § 718.204 to establish total disability due to pneumoconiosis and there is no presumption in this case that

Claimant's disability was caused by the disease. *Baumbartner v. Director, OWCP*, 9 BLR 1-65, 1-66 (1986). Thus, even if the medical opinions establish a total respiratory disability, as they have, the regulations still require Claimant to show that pneumoconiosis was a *substantially contributing cause* of that impairment. 20 C.F.R. § 718.204(c)(1).

Following the Board's directive, I must assign probative weight to each opinion as it relates to the issue of whether the miner suffered from cor pulmonale to be entitled to a finding of total disability under § 718.204(b)(2)(iii). Drs. Jones, Cohen and Green diagnosed cor pulmonale. However, Dr. Jones provided very little explanation for arriving at this conclusion in his autopsy report. As stated in my previous Decision, Drs. Cohen and Green provided a somewhat better explanation, but still did not supply the extensive rationale and supporting basis that was seen in the reports by Drs. Caffrey and Tuteur explaining why Mr. Hixon did not suffer from cor pulmonale. These explanations were quoted, verbatim, in my previous Decision and Order and, thus, will not be included here. Therefore, I assign less probative weight to the opinions of Drs. Jones, Cohen and Green than the opinions of Drs. Caffrey and Tuteur as they are not as well-reasoned on this issue of whether cor pulmonale was present. *Midland Coal Co. v. Director, OCWP [Shores]*, 358 F.3d 486 (7th Cir. 2004); *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 108 (1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, it is noteworthy that none of the other board-certified pulmonary specialists and pathologists of record, particularly Drs. Repsher, Naeye, Kleinerman or Renn, mentioned or diagnosed the existence of cor pulmonale in any of their medical reports or subsequent depositions. Thus, the weight of this evidence does not support a finding of cor pulmonale under § 718.204(b)(2)(iii).

Similarly, the opinions by Drs. Repsher, Naeye, Kleinerman, Renn, Caffrey and Tuteur were, in total, more comprehensive and reasoned in their statements, explanations and reliance on the objective tests of record in finding that Mr. Hixon's disability was not due to pneumoconiosis. Contrary to the argument set forth by Claimant's attorney in her Brief on Remand, it is not the place of an Administrative Law Judge to interpret the medical evidence. Rather, it is the fact-finder's responsibility to rely on the medical experts' interpretations and decide the weight to be assigned to each according to the basis of their conclusions.

Dr. Repsher pointed out several specific flaws in Dr. Jones' report, including an inaccurate employment history; inaccurate readings of the x-ray evidence; inaccurate reading of the pulmonary function tests and blood gas studies of record; misinterpretation of the extent of the miner's pneumoconiosis as "extensive," contrary to the majority of the evidence and his own autopsy results; misdiagnosing right ventricular hypertrophy and cor pulmonale notwithstanding a lack of evidence of either; and lack of evidence showing COPD. Dr. Naeye, a widely published board-certified pathologist, noted only a small amount of black pigment and found very simple pneumoconiosis based on the few micronodules in the miner's lungs. Based on this evidence, Dr. Naeye reasonably concluded that Mr. Hixon could not have been disabled in any way because of this disease.

Dr. Kleinerman's conclusion that Mr. Hixon could not have been disabled due to pneumoconiosis or have died due to this disease was also based on a superior explanation detailing his belief that the major lesions in the miner's lungs were due to pulmonary edema, centriacinar and panacinar emphysema and focal bronchopneumonia. Dr. Renn went into great detail to arrive at his conclusion, as well, citing normal gas exchange, x-ray evidence, the miner's other serious health conditions that contributed to his death, evidence of the miner's inadequately-controlled hypertension, and the mild degree of pneumoconiosis that was discovered upon autopsy. Dr. Caffrey's well-reasoned statement disagreeing with Dr. Jones' opinion and diagnosis was set forth in my prior Decision and is the most comprehensive of all the reports of record in providing a basis for concluding that pneumoconiosis did not play a role in the miner's disability or death.

Lastly, Dr. Tuteur's review provided an extensive explanation of how the miner's other conditions, such as his cerebral vascular disease and hypertension, led to the miner's disability and demise without pneumoconiosis as a contributing factor. Dr. Tuteur provided additional clarification in two subsequent depositions.

Drs. Repsher, Naeye, Kleinerman, Renn, Caffrey and Tuteur fairly considered the miner's smoking history of 26 pack years, the miner's medical history of strokes and his history of a severe heart condition as the principal causes of his disability, whereas Drs. Miles, Cohen and Green focused on the miner's mild pneumoconiosis and respiratory conditions without providing similar detailed and comprehensive explanations of how the miner's more serious health conditions and the overall

picture of his health interacted to lead to his disability and, eventually lead to his death. Adding more doubt to a diagnosis of total disability are the numerous hospitalization reports from the Vermillion Convalescent Center and the VA Center where the miner was treated for various conditions in 1996 and 1997. The absence of any positive diagnosis of or treatment for pneumoconiosis aside from a mention of the disease in the patient's provided history is notable, in that the miner was apparently not considered disabled from this disease to such a degree that it called for active treatment or even discussion during his visits and overnight stays at those facilities.

Based on all of the reports and objective evidence of record, I find the opinions of Drs. Repsher, Naeye, Kleinerman, Renn, Caffrey and Tuteur better documented and supported, thereby entitling those opinions to greater probative weight. *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Thus, I assign greater probative weight to these opinions over the less-reasoned and less comprehensive opinions of Drs. Jones, Miles and Green. The majority of the specialists who found that Mr. Hixon's mild case of pneumoconiosis could not have produced or contributed to his total disability relied on the absence of qualifying values in either the pulmonary function tests or blood gas studies and the evidence of only simple pneumoconiosis to arrive at their diagnoses. As a result, I conclude that the evidence does not establish that Mr. Hixon's mild pneumoconiosis was a "simple contributing cause" of the miner's disability pursuant to § 718.202(b)(2)(iv).

I will now address the issue of whether Mr. Hixon would have been disabled at the same time and to the same extent by conditions other than pneumoconiosis, as applied to claims arising in the Seventh Circuit pursuant to *Peabody Coal v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). Complying with the Board's directive, I will reconsider the medical evidence to specifically determine whether the miner became totally disabled "by conditions other than pneumoconiosis before he became disabled due to the effects of stroke, diabetes, pneumonia, and colon cancer."

The examination reports of Drs. Patel and Spendal, who had the opportunity to observe and treat the miner in 1994 and 1996, note that the miner suffered from a myriad of serious conditions that placed him in a "severely compromised position," even without his respiratory disease and subsequent need for oxygen therapy. The record also contains a decision by the Department

of Health and Human Services (DHHS) dated September 27, 1989, in which an Administrative Law Judge determined that Mr. Hixon was disabled from performing his usual coal mine work due to severe hypertension, post transient ischemic attack, diabetes mellitus and carpal tunnel syndrome. (DX 25) Pneumoconiosis was not mentioned in this decision. Although this previous DHHS decision is not binding on my decision surrounding this Part C black lung claim filed with the Department of Labor, the evidence presented therein may still be considered as relevant. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Prior to his first stroke in 1989, Mr. Hixon was able to do household chores, but even then had experienced blurred vision and weakness in his hands. (Tr. 1996 hearing, pp. 10-20). Mrs. Hixon, herself, testified at the hearing in 1996 that her husband had suffered from other significant medical problems during the previous five years, including several strokes that had totally incapacitated him. When Dr. Pangan examined the miner in 1988, he found "no pulmonary pathology" at that time that would have been the cause of disability. Dr. Spendal eventually noted that COPD was a complicating factor for the pneumonia he diagnosed in 1997, but was treating Mr. Hixon at that time only for colon problems.

All of this evidence supports my finding that Mr. Hixon, prior to his diagnosis of pneumoconiosis, was totally disabled from performing his usual coal mine work. In a footnote, the Board stated that if fully credited, the opinions of Drs. Jones, Cohen, Green and Caffrey could support a determination that the miner became totally disabled before experiencing the other conditions to which I had previously referred in my prior decision. However, Dr. Caffrey was of the opinion that pneumoconiosis had never been a significant contributing factor to the miner's disability, so that his disability had always been due to factors other than this disease. Dr. Jones wrote that the miner's CWP was "long-standing," without providing a basis for this opinion and this doctor did not note a specific time frame surrounding the patient's development of a disability due to this or any other respiratory disease as opposed to becoming disabled due to his other conditions. Dr. Cohen mentioned a "gradual worsening" of the miner's respiratory condition after 1988, but like Dr. Jones, did not state that the miner may have been disabled from his pneumoconiosis rather than due to other conditions prior to this year. Notwithstanding conflicting evidence, Claimant still has the burden of proof on all issues, including the issue of whether he was totally disabled due to pneumoconiosis and not to some other condition or combination thereof, to be entitled to benefits. I conclude

that the miner was totally disabled from conditions other than pneumoconiosis before any pneumoconiosis disability occurred.

For the same reasons provided, above, I assign greater weight to the opinions of Drs. Repsher, Naeye, Kleinerman, Renn, Caffrey and Tuteur surrounding the issue of whether the simple pneumoconiosis found in the miner's lungs contributed to his death. As explained in my prior Decision, all of these physicians specifically found that the degree of pneumoconiosis was far too little to have contributed in any way or hastened the death of the miner. Therefore, I find that the surviving spouse has not met her burden pursuant to § 718.205(c).

ENTITLEMENT

Claimants have failed to establish entitlement to benefits under any applicable part of the Act or regulations. Therefore, I find that they are not entitled to benefits.

ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimants for legal services rendered in pursuit of these claims.

ORDER

The claims of Richard Hixon, deceased miner, and Jo Anne Hixon, surviving spouse of miner Richard Hixon for benefits under the Act are denied.

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RUDOLF. L. JANSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.